

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 711 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAMNIKLAL G. VANZARA

Versus

HEIRS OF DECEASED:I.G. VANZARAPADMABEN WD/O I.G. VANZARA

Appearance:

MR ARUN H MEHTA for Petitioner

MR VH DESAI for Respondent No. 1

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 02/02/98

ORAL JUDGEMENT

This Revision is directed against the order dated 31.3.1992 passed below Exh.27 by Civil Judge (SD), Valsad in Special Civil Suit No.1 of 1985 filed by Ishwarlal Vanzara & Ors. By the said order, the application for bringing heirs of the deceased Ishwarlal Vanzara has been granted.

2. It is not in dispute that Ishwarlal was the sole plaintiff. He expired on 29.8.1987. The application for bringing the legal representatives was filed on 20.10.1988. Apparently, the application was filed after the suit had abated. Learned Judge observed that as the application was not filed within 90 days of the death of the original plaintiff, the suit automatically abates, but as the suit has remained pending, it cannot be said that the proceedings were over, and therefore, it was open for him to consider the reasons for the delay in filing the application. The learned Judge also noticed the fact that no application has been filed for setting aside the abatement. The learned Judge, without stating any reason in the order, has simply said that he is inclined to excuse the delay so as to make the parties to contest the matter on merit. Order 22 Rule 4 of the Civil Procedure Code provides the procedure in case of death of one of several defendants or of sole defendant. Sub-clause (1) provides that within the time limit, by law when no application is made under sub-rule (i), the suit shall abate so far as the deceased plaintiff is concerned. Limitation provided for filing of application for bringing the legal representatives is 90 days. Application for setting aside an application for abatement can be filed under Order 22 Rule 9(2) within 60 days. Sub-clause (3) Rule 9 Order 22 provided that provisions of section 5 of the Limitations Act shall applies to applications under sub-rule (2). Therefore, at the first instance, an application is required to be filed within 90 days for bringing legal representatives on record and if such application is not filed, the suit shall abate. An application under Order 22 Rule 9(2) can be filed within 60 days from the date of petition for setting aside the abatement. Even if an application is not filed within 60 days for setting aside the abatement, such application can be filed along with application under section 5 of the Limitations Act giving sufficient reasons for delay in filing such applications. But in the instant case, there is no application for setting aside the abatement. Obviously there is no application under section 5 of the Limitation Act for setting aside the abatement. The only application filed is for taking the legal representatives on record and some reasons have been given for condoning the delay in filing the application. In absence of any application for setting aside the application for abatement and application under section 5 of the Limitations Act for condonation of delay. the learned Judge has committed material illegality in exercise of jurisdiction in granting the application for taking the legal representatives of the deceased plaintiff on record. The authority of the

Supreme Court on the point, reported in AIR 1983 SC 673, has not been considered by the learned Judge in its right perspective.

3. In view of the aforesaid, this Civil Revision Application is allowed. The order dated 31.3.1992 passed by the Civil Judge (SD), Valsad is quashed and set aside. The application below Exh. 27 stands rejected. Rule is made absolute.

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msp.